IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 160

IN THE MATTER

of

SAMUEL ROSE,

Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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This brief is submitted on behalf of the Association of the Bar of the City of New York, herein sometimes referred to as the respondent. The respondent appeared in the court below in opposition to the petitioner's motion.

Jurisdictional Statement.

The jurisdiction of this Court is invoked by the petitioner under §237(b) of the Judicial Code, 28USCA §344(b) on the alleged ground that the proceedings below involved a right under the Constitution of the United States.

Statement of the Case.

Petitioner was admitted to the bar of the State of New York in 1918 (56).

On November 29, 1929 petitioner executed under circumstances described at fols. 104-106 incl. a document containing his resignation as a member of the bar of the State of New York and his consent to the entry without further notice of an order striking his name from the roll of attorneys (67-69), and an affidavit stating that the consent was the act of his own free will (70-72). The consent, to which there was annexed the proposed order to be entered (68, 71), was upon petitioner's request accepted by the respondent's attorney for presentation to the court (72). Upon such presentation, the Appellate Division on December 2, 1929 entered the order thus submitted (61-66).

On October 30, 1933, petitioner made a petition to the Appellate Division for an order reinstating him at the bar and vacating the order of December 2, 1929. The Appellate Division denied the petition without opinion. Leave to appeal was granted by the Court of Appeals. Upon such appeal, petitioner argued (a) that the denial of his motion to reinstate was an abuse of discretion, and (b) that the motion to vacate the order of December 2, 1929 should have been granted on the ground that the Appellate Division lacked jurisdiction to enter the said order of disbarment. (*Matter of Rose,* 268 N. Y. 523, appellant's brief, Point III.) The Court of Appeals affirmed the order of the Appellate Division on June 11, 1935 without opinion (268 N. Y. 523).

In 1945, petitioner made another motion for reinstatement at the bar. It was denied without opinion by the Appellate Division, and the Court of Appeals denied leave to appeal on July 23, 1946.

In September 1946, petitioner made again a motion for an order vacating the order entered on December 2, 1929 (49-60). The Appellate Division denied the motion, without opinion. The writ of certiorari is sought to review this decision.

ARGUMENT.

POINT I.

This Court lacks jurisdiction since the decision below does not necessarily or directly involve a constitutional question.

(a) The real issue presented by the motion below and by the petition to this Court is whether the Appellate Division had jurisdiction to enter the order of December 2, 1929.

In the petitioner's own words (Petitioner's brief, p. 38), the notice of motion in the Appellate Division sought relief

> "*on the sole ground* that the Appellate Division lacked the power to enter the order of disbarment against the petitioner, and that *by reason of such lack of power,* his constitutional rights had been violated." (Italics added.)

Again, in the petitioner's own words (Petition for a Writ of Certiorari, p. 10) "the question presented" by the petition to this Court is:

> "Does the making of the order of disbarment herein by said Appellate Division. . . . exceed the power granted to said Appellate Division by the Legislature of New York, and, *therefore,* in contravention of. . . . the Constitution of the United States . . . ?" (Italics added.)

Since it thus appears that the real issue is whether the Appellate Division had jurisdiction to enter the disbarment order, the decision to be reviewed does not necessarily and directly involve the construction or application of the Constitution of the United States.

Empire State-Idaho Mining Co. v. *Hanley,* 205 U. S. 225, 232 (1907);
In re Lennon, 150 U. S. 393, 400-401 (1893).

(b) The Appellate Division may well have denied the motion on the ground of *res adjudicata.*

The writ will not be granted unless it affirmatively appears on the face of the record that a federal question was expressly or necessarily decided by the state court.

Mellon v. *O'Neil,* 275 U. S. 212, 214 (1927);
Whitney v. *California,* 274 U. S. 357, 360 (1927).

In the instant case, the record is barren of such showing. The record, however, does show

(1) that in an earlier proceeding, commenced on October 30, 1933, the petitioner had petitioned the Appellate Division for an order vacating the order of disbarment of December 2, 1929 (107);

(2) that in support of said petition, petitioner had argued that the Appellate Division had lacked jurisdiction to enter the said order of disbarment (108-110);

(3) that this earlier proceeding had been terminated by a decision of the Court of Appeals of June 11, 1935, affirming the order of the Appellate Division denying said petition (111); and

(4) that in the present proceeding, the respondent argued below that the question presented was *res adjudicata* (111).

Since the present proceeding presented as "the sole ground" (Petitioner's brief, p. 38) for relief the same ground as the earlier proceeding, namely the lack of power and jurisdiction to enter the order of disbarment against petitioner, with the sole addition that "by reason of such lack of power his constitutional rights had been violated" (*ibidem*), and since such an addition does not constitute an independent ground for relief but states merely a legal consequence of the alleged lack of jurisdiction, the decision below may well have been based on the ground of *res adjudicata*.

POINT II.

The entry of the order of December 2, 1929 did not violate the due process clause.

Petitioner's sole argument in this Court as well as below is that the law of New York did not authorize a consent disbarment procedure. From this premise, he concludes that the order of December 2, 1929 violated the due process clause, because entered without jurisdiction.

The question whether the "power and control" clause of Section 88 of the New York Judiciary Law, or the common law of New York, authorized the entry of a consent order, has been determined by the New York courts adversely to petitioner by the denial of his earlier petition and of his present motion. This determination is not subject to review in this Court.

Since the premise of petitioner's argument fails, his conclusion falls.

We do not understand petitioner to argue that a consent disbarment procedure authorized by the state law violates the due process requirement. Such an argument would be without merit. The privilege conferred by admission to the bar can be surrendered by consent. A consent order giving effect to such voluntary surrender constitutes due process, just as any consent decree or judgment upon confession constitutes due process in respect of other rights.

In *Ex Parte Wall,* 107 U. S. 265 (1882), an order of a United States District Judge disbarring an attorney was sustained against attack on the grounds that the District Court had no jurisdiction to disbar in summary proceedings without formal charges having been preferred, and that the order thus made denied the attorney due process of law. This Court quoted with approval from *Ex Parte Steinman and Hensel,* 95 Pa. 220, as follows:

> "We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice, and been afforded an opportunity to be heard in his defence" (p. 272).

On the question of due process of law, this Court wrote:

> "It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury is in violation of the Fifth Amendment of the Constitution, which forbids the depriving of any person of life, liberty, or property without due process of law. *But the action of the court in cases within its jurisdiction is due process of law.* It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and

meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration" (pp. 288-289). (Italics supplied.)

Regarding the procedure to be followed to satisfy the due process requirement, the Court stated:

> *"In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts"* (p. 289). (Italics supplied.)

The consent procedure is "suitable and proper to the nature of the case". The office of an attorney and counsellor at law imposes duties as well as it gives privileges. An attorney who desires to be relieved of his office and the obligations thereof properly may resign under procedures adapted to this purpose.

The consent procedure is also "sanctioned by the established customs and usages of the courts".

See:

Ex Parte Owen, 6 Vesey Jr. 11;
Ex Parte Foley, 8 Vesey Jr. 33;
Gresham v. *Superior Court,* 44 Cal. App. (2nd) 664 (1941);
In re Silbley, 151 Fla. 225 (1942);
People v. *Reed,* 341 Ill. 573 (1930);
Matter of Cashman, 261 App. Div. 227 (1941);
Matter of Lyons, 252 App. Div. 899 (1937);
In re Quartin, 266 App. Div. 733 (1943);
Ex Parte Thompson, 32 Or. 499 (1898);
In re Haddad, 106 Vt. 322 (1934).

Petitioner argues that the order is not simply one accepting petitioner's resignation, but, by virtue of additional language contained in the order, is one of disbarment (Petitioner's brief, p. 32, Point III). We cannot see the relevancy of this point on the constitutional issue. In the first place, it should be observed that the order was entered in the form as submitted to the court by the petitioner himself through the attorney of the respondent (68, 71-72, 63-64). In the second place, petitioner is not harmed by the additional commands in the order. He lost his privileges as a member of the bar by his own act—his consent to the entry of an order striking his name from the roll of attorneys.

Conclusion.

The petition should be denied.

Respectfully submitted,

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of the City of New York.

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